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Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMIE SAM LAUER,

Defendant and Appellant.

B307421

(Los Angeles County
Super. Ct No. A148449)

APPEAL from a postjudgment order of the Superior Court of the County of Los Angeles, Renee Korn, Judge. Reversed and remanded.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Matthew Rodriguez, Acting Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Idan Ivri and Wyatt E. Bloomfield, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant Jamie Lauer guilty of, among other crimes, murder and attempted murder, and the trial court sentenced him to life without the possibility of parole. Those convictions were upheld on direct appeal and in a subsequent habeas proceeding.

Defendant appeals from the trial court's denial of his postjudgment petition for resentencing under Penal Code section 1170.95.¹ We reverse and remand the matter for further proceedings consistent with this opinion.

II. FACTUAL BACKGROUND²

Defendant and codefendants John Butterfield, Jr., Timothy Walder, and Larry Boone were convicted of crimes that “arose out of an evening-long crime spree on the night of May 22–23, 1981. [Defendants] were guests at the apartment of Kathleen Williamson and Cassandra Craft. About 10 p.m., Boone announced that he knew how to make some money and would show everyone how. Boone and [defendants] left the apartment and proceeded to the hotel room of [attempted murder victim] Robert Kimberly, an acquaintance of Butterfield. Kimberly

¹ All further statutory references are to the Penal Code.

² The facts are taken from the unpublished opinion in the postjudgment writ proceeding in *In re Lauer, et al.* (Jan. 24, 1989, B011500, B014634, B018379) [nonpub. opn.] at pages 2–5 (*Lauer II*).

invited everyone in for a beer. When the beer ran out, the group proceeded to a liquor store to buy more. After Kimberly purchased the beer, Boone drove to an unlighted area and announced to Kimberly that he was being robbed.

“After knocking out one of Kimberly’s teeth, Boone instructed Butterfield to ‘drive to the cemetery.’ Kimberly pleaded with all four to let him go, promising to get them more money and not to tell anyone what had happened. Walder was heard to say, ‘He knows us. We’re going to have to kill him.’

“Near the cemetery, everyone got out of the car and Kimberly was relieved of his wallet. He attempted to escape by running down the road but the four managed to overtake him, beat him, and stab him. (Altogether, Kimberly received about eight blows to the head and eighteen stab wounds in his back.) He feigned unconsciousness and heard Walder say, ‘That’s it, he’s had it. He’s dead. Let’s go.’

“After the four departed, Kimberly managed to walk for about two hours until he was found by a passing motorist and taken to the hospital. He recovered from his wounds and testified at [defendants’] trial.

“After leaving Kimberly for dead, [defendants] and Boone returned to Williamson’s apartment with the beer and a wad of bills. They remained only a short time before leaving again.

“They eventually went to the home of [murder victim] Ray Martin, another acquaintance of Butterfield (who had previously traded his motorcycle to Martin’s roommate in exchange for a car). Martin’s roommate, Paul Fuller, returned home at about 2:30 a.m. to find the motorcycle lying on its side with the headlight still on, but dimming. Inside his apartment, he found the battered body of Martin, with blood and matted hair

splattered on the wall. The coroner's investigator testified at [defendants'] trial that Martin had one stab wound in the chest, seven stab wounds in the upper right quadrant of the back, a deep laceration above and 'into the right eye,' and another deep laceration on the back of the skull, with a skull fracture. This was apparently caused by a hammer, which investigators later found in a vacant lot, covered with blood.

"After leaving Martin's apartment, [defendants] returned to Williamson's apartment, where Williamson noticed that Boone had blood on his pants and Walder had blood on his knife and hands. Later, when Williamson and Butterfield were in bed together, Butterfield made two references to having been at the scene of the crime: 'I saw my Sporty there [the motorcycle] and I wanted to burn it to the ground,' and 'I think that guy is dead.'

"The evidence at trial established that [defendants] had sold tools and guns owned by Martin to a 'fence' for \$100. Although Martin had been paid in cash on the day of his murder, his pockets had been turned inside out and all of the cash was missing." (*Lauer II, supra*, at pp. 2–5.)

III. PROCEDURAL BACKGROUND

Based on the two incidents on May 22 and 23, 1981, defendant and codefendants Butterfield, Walder, and Boone were convicted of the robbery and murder of Martin and the kidnapping, robbery, and attempted murder of Kimberly. (*In re Lauer* (1986) 228 Cal.Rptr. 794, 795, review granted Oct. 30, 1986 (Crim. 25360) (*Lauer I*.) The jury also found true a special circumstance allegation that the murder was committed during the course of a robbery. (*Id.* at p. 795.) All four defendants were

sentenced to life imprisonment without the possibility of parole. (*Ibid.*) The convictions were affirmed on appeal in *People v. Boone, et al.* (Crim. No. 42811).³ (*Lauer I, supra*, 228 Cal.Rptr. at p. 795.)

Defendant, Butterfield, and Walder filed separate petitions for writs of habeas corpus, contending that the special circumstance finding should be set aside under *Carlos v. Superior Court* (1983) 35 Cal.3d 131 (*Carlos*) (overruled, in part, in *People v. Anderson* (1987) 43 Cal.3d 1104, 1115 (*Anderson*)) because the jury was not instructed that proof of intent to kill or aid in the killing was essential to a finding of murder with special circumstances. (*Lauer I, supra*, 228 Cal.Rptr. at p. 794, fn. omitted.) On July 31, 1986, a prior panel of this division issued a published opinion granting the habeas petitions under *Carlos* and setting aside the special circumstance findings and the life without the possibility of parole sentences. (*Lauer I, supra*, 228 Cal.Rptr. at p. 797.) The Supreme Court, however, granted review as to each matter and remanded to the appellate court for reconsideration under *Anderson, supra*, 43 Cal.3d 1104 (superseded by statute as stated in *People v. Odom* (2016) 244 Cal.App.4th 237, 251) and *People v. Olde* (1988) 45 Cal.3d 386 (*Olde*) (overruled on other grounds as stated in *People v. Prieto* (2003) 30 Cal.4th 226, 256).⁴ (*Lauer II, supra*, at p. 2.)

³ The unpublished opinion in the consolidated direct appeals from the judgments of conviction is not in our record, and the parties agree that it is unavailable.

⁴ *Anderson, supra*, 43 Cal.3d at pages 1128 through 1129 and *Olde, supra*, 45 Cal.3d at pages 413 through 414 held that error

On remand, the appellate court issued an unpublished opinion, *Lauer II*, which reconsidered the habeas petitions under *Chapman, supra*, 386 U.S. 18. (*Lauer II, supra*, at pp. 2, 8–9.) The court observed that the evidence at trial “placed all four defendants at the scene of Martin’s murder. The murder was committed in a manner which strongly suggested that it was a group effort. Unfortunately, the evidence did not reveal which members of the group participated in the actual killing.” (*Id.* at p. 7.) The court then concluded that the trial court’s error in instructing the jury was harmless because “[f]irst, [defendants] attempted unsuccessfully to present a diminished capacity defense, indicating their recognition that the issue of their state of mind at the time of the crimes was of some importance. Second, the nature of the crimes charged was such that ‘no rational jury could find’ that [defendants] committed the crimes charged but did so without intending to kill.” (*Id.* at p. 8.) Because “[t]he parties recognized that intent was an issue, and the record not only establishes the necessary intent as a matter of law, but shows the contrary evidence not worthy of consideration[,]” the court denied the habeas petitions. (*Id.* at pp. 8–9.)

On January 9, 2019, defendant filed a petition for resentencing under section 1170.95. The prosecution filed an initial opposition in June 2019 which attached a copy of *Lauer II*, and defendant, with the assistance of appointed counsel, filed a

which implicates federal constitutional rights, including instructional error, must be reviewed under the beyond-a-reasonable-doubt harmless error standard in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

reply. Following further briefing by both parties, the trial court held a hearing on August 6, 2020, and denied the petition on the grounds that (1) defendant failed to make a prima facie showing of eligibility for relief because the evidence established that he was a direct aider and abettor in the murder and (2) under *People v. Galvan* (2020) 52 Cal.App.5th 1134, review granted October 14, 2020, S264284 (*Galvan*), the special circumstance finding barred him from resentencing relief unless and until he first obtained habeas relief from that finding.

The next day, the trial court issued a minute order confirming its denial of the petition, finding that “[g]iven the events surrounding the attempted murder of Kimberly, it defies credulity that [defendant] went with the same three accomplices to Martin’s apartment a short time later without full knowledge that they were going to murder Martin, who was also an acquaintance and could identify participants if not murdered. As the court of appeal[] stated [in *Lauer II*], ‘no rational jury could find’ a lack of intent to kill by [defendant] and his accomplices when they went to Martin’s apartment to rob him.” The court also cited *Galvan, supra*, 52 Cal.App.5th 1134 and concluded that because the jury had found the special circumstance allegation to be true, defendant was ineligible as a matter of law to have his murder sentence vacated under section 1170.95.

Defendant appealed from the order denying his section 1170.95 petition and on August 24, 2021, we affirmed the order, in part, and reversed and remanded, in part. On September 29, 2021, defendant filed a petition for review in our Supreme Court.

On October 25, 2021, the Governor signed Senate Bill No. 775, which amended section 1170.95 to permit resentencing of certain persons convicted of attempted murder under a natural

and probable consequences theory. (§ 1170.95, subd. (a); see Sen. Bill No. 775 (2021–2022 Reg. Sess.), as amended October 5, 2021, p. 3; Stats. 2021, ch. 551, §§ 1–2.) The Supreme Court then transferred the matter back to us with directions to vacate our decision and reconsider the cause in light of Senate Bill No. 775. We vacated our opinion and defendant and the Attorney General then submitted additional supplemental briefs.

IV. DISCUSSION

A. *Section 1170.95*

Section 1170.95, as amended by Senate Bill No. 775, “creates a procedure for convicted murderers [and attempted murderers] who could not be convicted under the law as amended to retroactively seek relief.” (*People v. Lewis* (2021) 11 Cal.5th 952, 957 (*Lewis*)). Where a petitioner files a section 1170.95 petition that contains all of the statutorily required information and requests counsel, the court must appoint counsel and order briefing. (*Id.* at p. 966.)

When briefing has been completed, “the court shall hold a hearing to determine whether the petitioner has made a prima facie case for relief. If the petitioner makes a prima facie showing that the petitioner is entitled to relief, the court shall issue an order to show cause.” (§ 1170.95, subd. (c).) Within 60 days of issuance of the order to show cause, the trial court shall hold a hearing “to determine whether the petitioner is entitled to relief.” (§ 1170.95, subd. (d)(1) & (3).) “[T]he burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder under

California law as amended by the changes to Section 188 or 189 made effective January 1, 2019.” (§ 1170.95, subd. (d)(3).) The trial court acts as the finder of fact when determining whether the prosecution has met its burden beyond a reasonable doubt. (See *Ibid.*; *People v. Gentile* (2020) 10 Cal.5th 830, 855 [“section 1170.95 requires the superior court to determine on an individualized basis, after considering any new or additional evidence offered by the parties, whether the defendant is entitled to relief”].)

B. *Murder Conviction*

Defendant contends, among other things, that (1) the trial court erred by weighing the evidence at the prima facie inquiry stage of the resentencing proceeding; and (2) the harmless error finding in *Lauer II* based on the prior record of conviction should not preclude sentencing relief because section 1170.95, subdivision (d)(3) permits both defendants and the prosecution to introduce new or additional evidence on the issues of whether defendant acted with the requisite intent to kill or was a major participant who acted with reckless indifference to human life. The Attorney General counters that the trial court’s denial of the petition as to defendant’s murder conviction can be upheld under two different legal theories not articulated by the court, namely, the doctrines of law of the case and collateral estoppel.

We disagree with the Attorney General’s contention. In our view, giving preclusive effect to the appellate opinion in *Lauer II* at this preliminary stage would be inconsistent with our Supreme Court’s opinion in *Lewis, supra*, 11 Cal.5th 952 that the bar at the prima facie stage is intentionally low and appellate opinions,

although probative on a particular issue, do not necessarily “supply all [the] answers.” (*Id.* at p. 972; see also § 1170.95, subd. (d)(3) [“The court may also consider *the procedural history of the case* recited in any prior appellate opinion”], italics added.)⁵

In the *Lauer II* habeas proceeding, the Supreme Court directed the Court of Appeal to determine whether the trial court’s failure to instruct the jury that proof of an intent to kill was essential to a special circumstance finding constituted prejudicial error under *Chapman, supra*, 386 U.S. 18. On remand, the Court of Appeal in *Lauer II* determined that the instructional error was harmless because no rational jury could have found that defendant committed the charged crimes, “but did so without intending to kill.” This conclusion does not demonstrate, as a matter of law, that defendant cannot meet his prima facie burden to show that he could not be convicted of murder following the amendments to sections 188 and 189, i.e., that he did not act with the intent to kill and was not a major participant in the robbery who acted with reckless indifference to human life. (See, e.g. *People v. Jurado* (2006) 38 Cal.4th 72, 94; *People v. Berg* (2019) 34 Cal.App.5th 856, 875, fn. 20.) As noted, at the section 1170.95, subdivision (d)(3) hearing, the parties will be permitted to introduce new evidence and arguments for the trial court’s consideration. (§ 1170.95, subd. (d)(3); *People v. Smith* (2020) 49 Cal.App.5th 85, 95, review granted July 22, 2020, S262835 (*Smith*).) Thus, unlike *Lauer II*, in which the appellate court’s review was limited to the record of conviction

⁵ We note that the trial court did not have the benefit of the amended statute or guidance provided by *Lewis, supra*, 11 Cal.5th 952.

and any rational inferences to be drawn therefrom, the trial court in the section 1170.95, subdivision (d)(3) hearing is not necessarily so limited. We therefore agree with defendant that the court erred by weighing the evidence and engaging in fact finding prior to issuing an order to show cause and holding a hearing at which the parties would be permitted to submit additional evidence and arguments on whether defendant was entitled to resentencing on his murder conviction. (See *Lewis, supra*, 11 Cal.5th at pp. 971–972; *Smith, supra*, 49 Cal.App.5th at p. 95.)

We next consider defendant’s contention that the trial court erred in finding that the jury’s felony murder special circumstances finding, made before *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark* (2016) 63 Cal.4th 522 were decided, prevented defendant from making a prima facie showing that he was entitled to relief. The Courts of Appeal are in disagreement regarding this issue, which is currently pending before the Supreme Court. (*People v. Strong* (Dec. 18, 2020, C091162) [nonpub. opn.], review granted Mar. 10, 2021, S266606.) In the absence of a decision by the Supreme Court, we see no reason to depart from our prior holding that the special circumstances finding does not prevent defendant from making a prima facie showing that he is entitled to relief. (*People v. York* (2020) 54 Cal.App.5th 250, 257–263, abrogated on another ground in *Lewis, supra*, 11 Cal. 5th at p. 952.)

C. *Sentence on Attempted Murder*

Defendant contends, the Attorney General concedes, and we agree that under Senate Bill No. 775, defendant is entitled to

a remand for further proceedings on his attempted murder conviction. We therefore will remand accordingly.

V. DISPOSITION

We reverse the trial court's order denying defendant's section 1170.95 petition and remand with directions to issue an order to show cause and hold a hearing pursuant to section 1170.95, subdivision (d).

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KIM, J.

We concur:

RUBIN, P. J.

BAKER, J.